taking into consideration the reasonable duration of working life which the deceased, an odd job worker, would have but for the accident with a reduction for contingencies, and the fact that the estate will be getting a lump sum for the whole of this period. According to actuarial tables the savings of $90 per month on a multiplier of 20 years is $13,456.80. This in my opinion is the best estimate for the lost years based on pre-accident income.

To summarise, the assessments under the various heads are:

Head One for pain and suffering and loss of amenities, $20,000.

Head Two for loss of expectation of life under section 8 of the Civil Law Act, 1956, $4,000.

Head Three for loss of dependency under section 7 of the Civil Law Act, 1956, $14,185.60.

Head Four for lost years under section 8 of the Civil Law Act, 1956, $13,456.80.

My attention has been called to section 8(5) of our Civil Law Act, 1956, which reads:

"8(5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."

This subsection of our Act again is *in pari materia* with subsection 1(5) of the Law Reform Act, 1934, and in this connection I would quote what Lord Scarman said in his speech in *Gammell* v. *Wilson* (H/L) at page 591, when dealing with the English Act:

"Subsection (5) has some general significance. It makes clear that the rights which under the Act survive for the benefit of the estate are additional to, not a substitution for, the rights conferred on dependants by the fatal accidents legislation. In dealing, therefore, with a 'law reform' claim, the court has no regard to what dependants can claim under the Fatal Accidents Act. The converse is, however, not true. In assessing the loss of a dependency under the fatal accidents legislation the courts have always had regard to the benefits accruing to the dependants from the estate of the deceased. In most fatal accident cases, the dependants will, of course, be the beneficiaries of the estate. In such cases there will be no 'double recovery", by which is meant no recovery both by the estate and the dependants of damages calculated by reference to the lost earnings of the lost years; for the dependants' claim will be reduced or extinguished (subject to certain exceptions) by the benefits they receive from the estate. But, if the deceased has made a will leaving his estate, or a substantial part of it, to other than his dependants, both the estate and the dependants will have a claim."

As Thangavelu, the administrator and his wife will be the same persons benefitting under the above awards irrespective of whether the claims are under section 7 or section 8 of the Civil Law Act, 1956, and because the awards to be made for the benefit of the estate under section 8 exceeds the award for loss of dependency under section 7 the claim under section 7 is eliminated or extinguished by the amounts to be awarded under section 8 of the Civil Law Act, 1956.

I, therefore, make the following awards on the basis of 100% liability on the part of the defendant with interest thereon following the Federal Court decision in *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian*.[1]

(a) $20,000 for pain and suffering and loss of amenities with interest at 6% from date of service of writ to date of trial;

(b) $4,000 for loss of expectation of life with interest at 6% from date of service of writ to date of trial;

(c) $13,456.80 for lost years which will carry no interest;

(d) $850 agreed special damages (including funeral expenses) with interest at 3% from date of accident to date of trial.

As liability for the accident has been agreed at 50/50 I leave the matter of the arithmetical calculations on each of the awards to be paid by the defendant to the plaintiff to be worked out by counsel for the parties.

There will be an order for costs in favour of the plaintiff.

Order accordingly.

Solicitors: *R.K. Nathan & Co.; Tay, Tee & Co.*

TAN PUAN CHEE v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Azmi J.) March 6, 1981]

[Kuala Lumpur — Federal Territory Criminal Appeal No. 21 of 1980]

Landlord & Tenant — Rent-controlled premises — Offence and conviction — Appeal — Failure of learned Magistrate to invoke adverse presumption against prosecution for failing to call alleged four sub-tenants as witnesses — Control of Rent Act, 1966, s. 19(1)(a) & 19(c).

Evidence — Failure of learned Magistrate to invoke adverse presumption against prosecution for failing to call witnesses — Evidence Act, s. 114(g).

The appellant in this case was found guilty and convicted of an offence punishable under section 19(6) of the Control of Rent Act, 1966. She appealed against the said conviction on several grounds one of which was that the learned Magistrate had failed to invoke the adverse presumption against the prosecution under section 114(g) of the Evidence Act for their failure to call the alleged four sub-tenants as witnesses, although all of them were easily traceable.

Held, quashing the conviction and setting aside the sentence: (1) failure of the prosecution to call the alleged two sub-tenants as witnesses (the other two alleged subtenants had given evidence in favour of the appellant) should attract the adverse presumption under section 114(g) of the Evidence Act, in that, if they had been called, they would have given evidence against the prosecution as regards sub-letting;

(2) the failure of the learned Magistrate to consider whether the defence had raised a reasonable doubt in the prosecution case amounted to a misdirection in law as to the onus of proof placed on the defence; it is important that the court must give reason or reasons for rejecting the defence story.

Cases referred to:-

(1) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.

(2) *Mahadi* v. *Public Prosecutor* [1970] 1 M.L.J. 16.

(Cases cited but not mentioned in the judgment: *Abdul Rahim* v. *British & Malaya Trustees Ltd.* [1967] 1 M.L.J. 118; *Public Prosecutor* v. *Lim Kwai Thean* [1959] M.L.J. 179; *Maung Pein* v. *Ma The Ngwe* A.I.R. 1925 R. 143.)

CRIMINAL APPEAL.

Chew Kar Teng for the appellant.

Lamin bin Haji Mohamed Yunus (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: The appellant was found guilty and convicted by the Magistrate at Kuala Lumpur on the following charge:

"That you on February 13, 1979 at No. 48, Jalan Chow Kit, Kuala Lumpur being a tenant of controlled premises No. 48, Jalan Chow Kit, Kuala Lumpur as defined under the Control of Rent Act, 1966 did sublet part of the said controlled premises and that you failed to supply to the Landlady Puan Liew Kheng Yin with a statement in writing of the said subletting as required by section 19(1)(a) of the Control of Rent Act, 1966 and that you have thereby committed an offence punishable under section 19(6) of the said Act."

She was fined $250 in default one month imprisonment on March 5, 1980, and she has now appealed against conviction.

The Petition of Appeal contains numerous grounds, but in substance there are three main grounds. Firstly, it is contended that the learned Magistrate had allowed hearsay evidence to be admitted by Mr. Chee Chee Keong (PW2) — the Assistant Senior Valuation Officer of City Hall — to prove sub-letting by the appellant. Secondly, the learned Magistrate had failed to invoke the adverse presumption against the prosecution under section 114(g) of the Evidence Act for their failure to call the alleged four sub-tenants as witnesses, although all of them were easily traceable. Thirdly, it is argued that the learned Magistrate had failed to consider the evidence of defence witnesses and to consider whether the defence had cast a reasonable doubt in the prosecution case.

The prosecution case was based on the evidence of the landlady (PW1), the City Hall Valuation Officer (PW2) and on documentary evidence (Exhibits P4A and P4B). It was the prosecution case that PW1 became the proprietor of premises No. 48, Jalan Chow Kit, since July 1963 by purchase. The premises were protected by the Rent Control Act, and at time of purchase, the appellant was already a statutory tenant, and she continued to be so after the purchase paying a monthly rental of $121.16. After PW1 became the owner, it was contended that, apart from the appellant's hotel and coffee-shop, there were four other persons carrying on business there, viz.: —

(1) Kamal Batcha — a book seller.

(2) Loh Lai Kim — a record shop proprietor.

(3) Chan Kow — an electrical shop proprietor.

(4) Goh Pek Kheng — a mee seller.

It was also contended that since these four businesses were not there at time of purchase, PW1 wrote a letter through her solicitors to the appellant on March 9, 1977, requesting for particulars of sub-tenants as required under section 19(1) of the Control of Rent Act, 1966 (see Exhibit D1). By letter dated March 25, 1977, the appellant replied through her solicitor that there were no sub-tenants in the premises (Exhibit D2). In short, the appellant denied sub-letting the premises to anyone as alleged. By registered letter dated March 19, 1979 (Exhibit P5A), the Director of Valuation, City Hall, requested the appellant to furnish particulars of tenants within fourteen days both to the landlady (PW1) and City Hall, failing which, action would be taken against her under section 19(6) of the Act. Since the appellant failed to furnish the required particulars, the present charge was preferred against her.

To establish a case under section 19(1)(a) of the Rent Control Act, 1966, the prosecution must prove —

(a) that the defendant is a tenant of controlled premises;

(b) that the defendant sub-lets part of the controlled premises;

(c) that the defendant fails to supply to the landlady a statement in writing giving particulars of the sub-letting.

In this appeal, it is not seriously in dispute that the prosecution had proved ingredients (a) and (c), but there was serious controversy as to whether there was any sub-letting, i.e. ingredient (b). It was the contention of the defence that Kamal Batcha was merely a licensee paying no rent. His book-stall was along the wall of the five-foot-way, and, from Exhibit D8, it was shown that he merely paid for water and electricity. As regards the music record shop, the appellant contended that Loh Lai Kim (DW4) was his relative and was running the business on her behalf and not as a tenant. With regard to the electrical shop, her contention was that Chan Kow merely left his electrical goods in the shop and he had opened a shop next door. As regards the mee-stall, she said Goh Pek Kheng (DW2) ran the business for her as her employee. As such, none of them was a sub-tenant when the request for particulars was made in 1979.

On the first and second grounds of appeal, the learned Deputy Public Prosecutor concedes that DW2's evidence on sub-letting was mainly based on hearsay evidence and it is also conceded that the four alleged sub-tenants were not called by prosecution although they were traceable. Be that as it may, there was *prima facie* evidence from business registrations that Kamal Batcha ran a business of book-stall at the premises on April 15, 1977 (see Exhibit P4A) and Loh Lai Kim had a music record business on November 1972 (Exhibit P4B) and Chan Kow had an electrical business at the premises on April 5, 1978. In the event, I am of the view that the learned Magistrate was correct in calling for the defence at least in respect of the sub-letting to Loh Lai Kim.

However, on the third ground of appeal, the learned Magistrate after correctly setting out the defence version in his grounds of decision, brushed it aside in one sentence without giving any reason. After dealing with the defence explanation, this is what he said:

"Be that as it may I still find that Chan Kow and Kadir Batcha were sub-tenants and I do not accept the defence evidence on this issue."

He then proceeded to find the appellant guilty. From the above finding, it is apparent that the learned

Magistrate was satisfied that there was sub-letting to Chan Kow and Kamal Batcha. It should, however, be noted that both Kamal Batcha and Chan Kow had not been called by the prosecution and nor were they made available to the defence. During the trial, Kamal Batcha was still running the book-stall at the outer wall of the shop along the five-foot-way, and Chan Kow was also running business in a shop next door to the demised premises. Failure of the prosecution to call them, in my view, should attract the adverse presumption under section 114(g) of the Evidence Act, in that, if they had been called, they would have given evidence against the prosecution as regards sub-letting. The other two alleged sub-tenants, Loh Lai Kim and Goh Pek Kheng, had given evidence in favour of the appellant (DW2 and DW4). Although the learned Magistrate did not accept the defence evidence regarding Chan Kow and Kamal Batcha, before convicting the appellant, it was his duty to consider whether the defence had raised a reasonable doubt in the prosecution case. (See *Mat* v. *Public Prosecutor*[1] and *Mahadi* v. *Public Prosecutor*[2]). The failure of the learned Magistrate to do so would amount to a misdirection in law as to the onus of proof placed on the defence. It is important that the court must give reason or reasons for rejecting the defence story. After that, the court must go one step further before convicting. As stated by Suffian J. (as he then was) in *Mat* v. *Public Prosecutor*:

"But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt. . . ."

In the circumstances, I allow this appeal. I quash the conviction and set aside the sentence of $250 fine in default one month imprisonment. If the fine has been paid, I order that the money be refunded to the appellant.

Conviction quashed and sentence set aside.

Solicitors: *Chew & Co.*

TAN TEO MUAH & ORS. v. ALKHARED & KHOO HOLDINGS SDN. BHD.

[O.C.J. (Arulanandom J.) April 21, 1980 & April 8, 1981]
[Penang — Originating Motion No. 5 of 1980]

Land Law — Caveat — Application to remove — Expiry of first caveat — Whether respondents could lodge second caveat — National Land Code, s. 326(2).

The facts in this case are briefly as follows. On the strength of an agreement of March 17, 1978, for the applicants to provide a piece of land for the purpose of constructing and erecting dwelling houses, the respondents had lodged a caveat against the said land. On October 18, 1979, the applicants caused a notice in Form 19C of the National Land Code to be served on the respondents for removal of the first caveat. By an *ex parte* Originating Summons of November 9, 1979, the respondents applied for the extension of the first caveat. On November 22, 1979, the said caveat was extended under section 326(2) of the National Land Code. The provisions of the said section 326(2) require "any person on whose application the caveat is extended to serve the order of court on the Registrar of Titles, who on being duly served is enjoined not to remove the caveat."

In the present case the respondents had failed to serve the relevant order on the Registrar and the caveat was accordingly removed after the period allowed by the notice in Form 19C. When the respondents realized that this had happened they immediately caused a further caveat to be lodged against the said land.

The question before the present court was whether the respondents were entitled to lodge a second caveat when the first had been removed.

Held, allowing the applicants' application: (1) once a caveat is removed, the removal is conclusive and it is extinguished forever;

(2) the second caveat should be removed forthwith.

Cases referred to:-

(1) *Damodaran* v. *Vasudeva* [1974] 1 M.L.J. 128, 129 & 130.

(2) *Arul Chandran* v. *Tara Rajaratnam* [1979] 2 M.L.J. 172, 174.

ORIGINATING MOTION.

R. Manecksha for the applicants.

N. Chandran for the respondents.

Cur. Adv. Vult.

Arulanandom J.: This was an application by motion by the applicant for an order that Caveat No. 2309/79 Jilid 35 Folio 189 lodged by the respondents Alkhared & Khoo Holdings Sdn. Bhd. in respect of Lot No. 1869 Mukim 13 Daerah Timor Laut, Pulau Pinang be removed.

The issue before the court was very simple. On the strength of an agreement dated March 17, 1978 for the applicants to provide a piece of land for the purpose of constructing and erecting dwelling houses, the respondents had lodged a caveat against the said land (hereinafter referred to as the first caveat). On October 18, 1979, the applicants caused a notice in Form 19C of the National Land Code to be served on the respondents for removal of the first caveat. The respondents promptly applied by an *ex parte* originating summons dated November 9, 1979, for an extension of the said first caveat and on November 22, 1979, the said caveat was extended under section 326(2) of the National Land Code.

Section 326(2) of the *National Land Code* reads as follows: —

"(2) The court may, on the application of any person or body on whom such a notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of one month; and the Registrar, on being duly served with any order of the court under this sub-section, shall not remove the caveat until the expiry of the said period as thereby extended."

By the provisions of this section it is incumbent on any person on whose application the caveat is extended to serve the order of court on the Registrar of Titles, who on being duly served is enjoined not to remove the said caveat.

In this instance, however, for reasons best known to themselves the respondents failed to serve the relevant order on the Registrar and the caveat was accordingly removed after the period allowed by the notice in Form 19C.

When the respondents realised that this had happened they immediately caused a further caveat, No. 2309 Jilid 35 Folio 189 (the subject-matter of this application), to be lodged against the said piece of land.